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NOTES.

THE RIGHT OF ACTION FOR MONEY HAD AND RECEIVED ON A FORGED CHECK.

It has long been recognized that, where a bank pays a check upon a forged indorsement, the bank is the loser; neither the drawer nor the payee is prejudiced by the act. And this rule is in no way altered by the fact that the bank making the payment is not the drawee of the check, but merely discounts it, and afterwards collects from the drawee. "As the non-drawee bank is under no obligation whatever to pay, it does so at its peril; this is a well-known rule."[1] The interesting

[1] 2 Bolles, Banks and Banking (1907), p. 730.

question arises when the attempt is made to fasten the loss upon the bank which dealt with the forger: is the only action that of the drawee bank to recover the money which it has paid, or has the payee of the check a remedy, either upon the instrument or collateral to it, directly against the collector bank?

The general rule may be stated to be, that in the absence of some form of acceptance by the bank, there is no action *upon the check* against it, in the name of the holder of the instrument.[2] A New York case[3] has allowed recovery under such circumstances, where the payee, before bringing suit, procured an assignment of all the rights of the drawer, but this goes rather upon the principle of assignment of a chose in action than upon any remedy under the law merchant. Another form of action was, however, suggested by the Supreme Court of the United States in the opinion in *Bank* v. *Millard,* 10 Wall. 152. *"It may be,"* reads the dictum, "if it could be shown that the bank had charged the check on its books against the drawer, and settled with him on that basis, that the plaintiff could recover on the count for money had and received, on the grounds that the rule *ex aequo et bono* would be applicable, as the bank, having assented to the order, and communicated its assent to the paymaster (the drawer) would be considered as holding the money thus appropriated to the plaintiff's use, and, therefore, under an implied promise to pay it on demand."

The quasi-contractual action here suggested has been brought in a great many cases,[4] with successful results, and it seems to be now a well-settled rule of law, that recovery will be allowed upon this form of pleading wherever it appears that the defendant may charge the payment made to the forger, to the drawee bank.[5] "If a negotiable instrument having a forged indorsement comes to the hands of a bank and is collected by it, the proceeds are held for the rightful owners of the paper, and may be recovered by them, although the bank gave value

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[2] *Bank of the Republic* v. *Millard,* 10 Wall. 152 (1869); *First National Bank of Washington* v. *Whitman,* 94 U. S. 343 (1876); *Saylor* v. *Bushong,* 100 Pa. 23 (1882).

[3] *Adler* v. *Broadway Bank of Brooklyn,* 30 N. Y. Misc. 382 (1900).

[4] *Buckley* v. *Bank of Jersey City,* 35 N. J. Law 400 (1872); *Farmer* v. *Bank,* 100 Tenn. 187 (1897); *Bobbett* v. *Pinckett,* 34 L. T. Rep. 851 (1876); *Shaffer* v. *McKee,* 19 Ohio 526 (1869); *Talbot* v. *Bank of Rochester,* 1 Hill. 295 (1841).

[5] *Clark* v. *Warren Savings Bank,* 31 Pa. Superior Ct. 647 (1906).

for the paper, or has paid over the proceeds to the party depositing the instrument for collection."[6]

The question came before the Supreme Court of Pennsylvania in the case of *Tibby Brothers Glass Co.* v. *Farmers' and Mechanics' Bank of Sharpsburg,* 220 Pa. 1. The plaintiff, who had an account with the defendant, had been in the habit of indorsing checks for deposit, though not for cashing, with a rubber stamp. A bookkeeper of plaintiff indorsed several checks drawn to plaintiff's order by customers on other banks, and defendant paid him cash for them, and collected them in due course from the drawee banks. Plaintiff, upon discovering the forgery, procured the checks from their customers, and brought assumpsit for money had and received to their use, against defendant, presenting the cancelled checks as evidence. The Court denied relief, Judge Mestrezat basing his opinion upon the grounds, first, that under the law of Pennsylvania, plaintiff would have no right of action against the drawee banks, and second, because the drawee banks can recover from the defendant the money paid it by them on the forged checks; hence it cannot be held to have been "received by defendant to the use of plaintiff."

The interesting feature about this decision is, that in *Seventh National Bank* v. *Cook,* 73 Pa. 483 (1873) the Court had allowed recovery in this action, where the transaction was confined to one bank—that is, A drew the check on the X bank to the order of B; C, B's clerk, forged B's name and drew the money from the bank, which thereupon charged the check to A. B procured the check from A and recovered against the bank.

The decisions in these two cases, arising under almost precisely similar facts, would seem to point out the test in each instance as to whether or not the quasi-contractual action may be maintained by the holder of the check. If the drawer submits to a charging of the wrongful payment against his account, the remedy reverts to the holder, and the rule of *Bank* v. *Cook* would be followed; whereas, if as in the Tibby case, there is no assurance that defendant will not be proceeded against by the drawees or the drawer as the circumstances may permit, and on the other hand every assurance that some such action will be brought, the holder will be denied relief,

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[6] 1 Morse, Banks and Banking, S. 248.
[7] *First National Bank* v. *Whitman,* 94 U. S. 343 (1876).

and sent back to his action on the original contract against the drawer, his customer or debtor.

This last remedy is always open to him, for it has been universally held that none of the transactions with respect to the forged paper amounts to a "payment" in the technical sense of the term.

THE RIGHT OF A THIRD PARTY TO SUE ON A CONTRACT.

The right of a third party to sue on a contract, made for his benefit but to which he was not a party, has been recognized so often and by so many jurisdictions, that it seems there must be some consistent principle on which to base it. The concensus of opinion of the textwriters, however, treats it as an anomaly. Certain well recognized transactions must be distinguished. Whenever property is delivered to one man with an obligation attached to the specific property conveyed or delivered, in favor of a third person, there is no difficulty in giving the latter a right to bring an action in his own name. The facts might show, either that the legal title was conveyed with an equitable obligation attached in favor of a *cestui que trust,* or that the legal title passed direct to the third party, by the transaction, and that the promisor became a bailee to deliver —as, for example, delivery of goods to a carrier in fulfillment of a contract to sell. In both of the above cases there is an obligation attached to the specific property conveyed. The right of action in the beneficiary is not based upon contract, but upon a property right. The same transaction creates a contract right in the promisee and a property right in the beneficiary. In the case of *Harrington* v. *Green,* 107 N. Y. Supp. 403 (Nov., 1907), the defendant received a check from the *promisee* for $372—$82.44 of which was for the plaintiff. No reasons were given to sustain the recovery allowed. Nor did the facts show whether the defendant was to pay the plaintiff out of the proceeds of the check. If such was the case, the defendant was clearly a trustee of an undivided moiety for the plaintiff.

The difficulty arises when the promisor receives property, with no obligations attached to the specific *res,* but upon a promise to pay out of general assets, a sum certain to a third party. The latter may or may not be the sole beneficiary— premiums are paid by an insured to an insurance company, which promises to pay a sum certain to a named beneficiary. A mortgagor conveys land to B, who promises to pay the debt